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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1911

No. [redacted]89

COSME BLANCO HERRERA AND JOSÉ BLANCO HERRERA, DOING BUSINESS UNDER THE FIRM NAME OF HERRERA NEPHEWS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 12, 1906.

(21,752.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 270.

COSME BLANCO HERRERA AND JOSÉ BLANCO HERRERA, DOING BUSINESS UNDER THE FIRM NAME OF HERRERA NEPHEWS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

No. 25,425.

COSME BLANCO HERRERA and JOSÉ BLANCO HERRERA
vs.
THE UNITED STATES.

I. *Petition and Amended Petition.*

The claimants, on the 15th day of June 1904 filed their original petition.

On June 29, 1905, by leave of Court, in lieu of said original petition, said claimants filed their amended petition, which is as follows:

2 In the Court of Claims.

No. 25,425.

COSME BLANCO HERRERA and JOSÉ BLANCO HERRERA
v.
THE UNITED STATES.

Amended Petition.

(Filed June 29, 1905.)

To the Honorable the Court of Claims:

Your claimants, Cosme Blanco Herrera and José Blanco Herrera, respectfully represent:

That they are citizens of the Republic of Cuba and reside in the city of Havana, and that on or about the 17th day of July, in the year 1898, your claimants were in existence as a copartnership, known under the firm name and style of Herrera's Nephews, doing business in the city of Havana and other ports and places in the Island of Cuba.

That on or about the 16th day of July, 1898, the United States being at war with Spain, the Spanish forces occupying the territory which constitutes the Division of Santiago, including the city and port of that name, capitulated to the United States according to the terms of a military convention, which provided that all hostilities between American and Spanish forces in the said district should absolutely and unequivocably cease, and that said capitulation should include "all forces and war material in the said territory." That on entering the said city of Santiago in accordance with the terms of the said capitulation the United States authorities

3 found in the harbor several boats and vessels belonging to various persons, and among said vessels the steamship *San*

Juan, the property of your claimants, which had been held and detained in the harbor of Santiago by reason of the blockade of said harbor and port maintained by the naval authorities of the United States.

That the said authorities of the United States took possession of the steamship San Juan as private property and without any claim of title by reason of capture, or confiscation, or forfeiture, and used her for proper and lawful governmental purposes, namely the transportation of troops and munitions of war.

That the authorities of the United States so held, detained and used said steamship *San Juan* to the entire exclusion of her owners, to wit your said claimants, from on or about the 24th day of July, 1898, till on or about the 18th day of May, 1899.

That your claimants were deprived of the use and profits of the said steamship by the United States for a period of two hundred and ninety-four (294) days, to wit from July 24, 1898, to May 18, 1899, or thereabouts, and that the sum of Three hundred dollars ($300) per day, amounting to Eighty-eight thousand two hundred dollars ($88,200) for the said period of two hundred and ninety-four (294) days would be a fair and reasonable compensation for the loss of the use and profits of the said steamship, together with Five thousand dollars ($5,000) for the loss, while in the possession of the authorities of the United States, of china, crockery and linen belonging to and on board of the said steamship and fairly worth the said sum, amounting in all to Ninety-three thousand two hundred dollars ($93,200).

That the United States authorities have failed entirely to pay the said amount of Ninety-three thousand two hundred dollars ($93,200) or any sum whatever, for the use and detention of
4 the said steamship and the loss of the said stores, and still refuse payment therefor.

That your claimants on or about the 2d day of November, 1898, and succeeding days until May 18, 1899, endeavored to secure the return of the said steamship from the military authorities of the United States, but the said authorities refused to return the said steamship unless your claimants would give to the said military authorities of the United States an absolute release from any and all claims for compensation for the use and detention of the said steamship by the said military authorities of the United States as aforesaid. This your claimants refused to do until on or about the said 18th day of May, 1899, when Robert Scott Douglass, your petitioner's agent, received the said vessel, the *San Juan*, from Maj. J. T. Knight, Chief Quartermaster at Santiago, and under duress executed said release.

That your claimants were compelled to execute the said release by the statement of said military authorities of the United States that the said vessel would be held and confiscated by the United States in the event of your claimants' continued refusal to accept the same on the terms proposed by the aforesaid military authorities of the United States.

That the detention and use by the United States military authori-

ties of the said vessel *San Juan* without proper compensation was in violation of a regulation of an Executive Department of the United States, to wit of the War Department as expressed in General Orders No. 101 of July 18, 1898, which were issued for the guidance of the officers and forces of the United States in Cuba, and which provided specifically as to the manner in which private property was to be treated during the military occupation of the Island of Cuba by forces of the United States, and especially as to the manner in which private property, when taken for the use of the United States should be paid for.

That the said order provided as follows:

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only as hereafter indicated. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.

"Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible receipts are to be given." Richardson's Presidents' Messages, Vol. X, pp. 208, 210.)

That your petitioners have repeatedly demanded payment of the United States for the said use and detention of their vessel, and that such payment has been repeatedly neglected and refused.

That the said firm of Herrera's Nephews was dissolved and liquidated in and about the month of January, 1903, and that your claimants held and retained to their own joint and several use all right, title and interest in and to the claim herein set forth.

That the claimants are the sole owners of this claim and the only persons interested therein, and no assignment or transfer of this claim, or of any part thereof or any interest therein, has been made.

The claimants are justly entitled to the amount herein claimed from the United States after allowing all just credits and setoffs.

Wherefore your claimants pray judgment in the sum of Ninety-three thousand two hundred dollars ($93,200).

COUDERT BROTHERS,
CRAMMOND KENNEDY,
Attorneys for Claimants.

FRANK D. PAVEY,
Of Counsel.

AMERICAN CONSULATE GENERAL,
Havana, Cuba, ss:

Cosme Blanco Herrera and José Blanco Herrera, being duly sworn, each deposes and says: I am one of the claimants in this case. I have read the foregoing amended petition, and the matters therein stated of my own knowledge are true and those stated on information and belief I believe to be true.

COSME BLANCO HERRERA.
JOSÉ BLANCO HERRERA.

Subscribed and sworn to before me this 20th day of June, 1905.

JOSEPH A. SPRINGER,
[SEAL.] *American Vice-Consul General.*

Fee No. 686 $2.

7 II. *Traverse.*

Filed March 18, 1908.

In the Court of Claims of the United States, December Term, A. D. 1908.

No. 25,425.

COSME BLANCO HERRERA and JOSE BLANCO HERRERA, Doing Business under the Firm Name of Herrera's Nephews,

vs.

THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

8 III. *Submission of Case.*

At a Court of Claims held on the 18th day of March, 1908, Messrs. Coudert Brothers and Mr. Crammond Kennedy, attorneys for the claimants, and Mr. Franklin W. Collins, on behalf of the defendants, submitted this cause.

9 IV. *Findings of Fact and Conclusion of Law and Opinion of the Court.*

Filed May 4, 1908.

COSME BLANCO HERRERA and JOSE BLANCO HERRERA, Doing Business under the Firm Name of Herrera Nephews,

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimants, Cosme Blanco Herrera and José Blanco Herrera, were, at the time of the taking of the property hereinafter men-

tioned, a commercial partnership doing business under the firm name of Herrera Nephews.

Said partners were born in Spain and were Spanish subjects during the Spanish régime in Cuba, residing in Habana. Neither of the claimants, after the exchange of the ratifications of the treaty of Paris between the United States and Spain, has, under the provisions of Article IX of said treaty, preserved his allegiance to the Crown of Spain by making a declaration of his decision to preserve such allegiance.

II.

Said claimants were, at the time of the capitulation of the city of Santiago to the American forces, on the 16th day of July, 1898, the owners of a certain steamship named the *San Juan*.

III.

On the date last mentioned the Spanish forces then occupying the territory which constituted the division of Santiago, including the city and port of that name, capitulated to the United States in accordance with the terms of a military convention which provided that all hostilities between the American and Spanish forces in said district should cease and that the Spanish forces should be returned, at the expense of the United States, to Spain.

Actual hostilities ceased with the surrender of Santiago. On entering the city of Santiago the United States authorities found in the harbor of Santiago said steamship *San Juan*, there held and detained by the blockade of the harbor and port by the United States naval authorities.

Said military authorities seized and captured said steamer *San Juan* on the 17th day of July, 1898, and thereafter used it for the transportation of troops, munitions of war, and stores and supplies to the troops and to indigent Cubans until November 8, 1898, a period of 115 days. The United States paid the cost of operating said steamer during said period. The reasonable value of the use of said vessel for said period of 115 days was $150 per day, amounting to the sum of $17,250, no part of which has been paid to claimants. Prior to its seizure as aforesaid said vessel had been used to transport Spanish troops, munitions of war, and supplies for the Spanish troops from place to place.

After the surrender of Santiago and the seizure of said steamer as aforesaid, the Secretary of War, on July 18, 1898, in pursuance of the proclamation of the President of July 13, 1898, issued General Order No. 101, which, among other things, provides that—

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity, are not to be retained. * * *

"Private property taken for the use of the Army is to be paid for,

when possible, in cash, at a fair valuation, and when payment in cash is not possible receipts are to be given."

Said order was promulgated in Cuba July 20, 1898.

IV.

On November 8, 1898, the Quartermaster-General of the Army sent the following telegram to R. A. C. Smith, New York, the representative and attorney in fact of claimants:

"It is proposed to return captured steamer *San Juan* to owners. Please wire name of owners."

On November 12, 1898, said Smith, after communicating with claimants, wrote the Quartermaster-General that claimants agreed to accept the vessel, reserving their right to make claim. Thereafter, on November 15, 1898, the War Department notified said Smith that the Government was ready to deliver said vessel to her owners upon condition that a receipt therefor be given by said owners, with a statement that the vessel is accepted with a full knowledge and understanding that the Secretary of War does not consider that any allowance is due the owners on account of the use of the vessel, she being captured property, or for any damage sustained while the vessel was in the possession of the United States, and that any claim subsequently made for such use and damage shall be a matter for future consideration of the War Department.

Claimants refused to accept the vessel on the terms offered and she remained in the possession of the United States authorities.

11 V.

On April 25, 1899, Major Knight, quartermaster at Santiago, on instructions from the War Department, wrote claimants' agent at Santiago as follows:

"You are respectfully informed that the honorable Secretary of War has ordered that if the owners of the *San Juan* do not receive the ship in accordance with the conditions hereinafter expressed said vessel shall be delivered to the Department of the Quartermaster of the Army and retained as the property of the United States."

Thereafter, on May 17, 1899, claimants accepted said vessel, and gave a receipt and release for the same in the following language:

"Received this 17th day of May, 1899, at Santiago, Cuba, from Maj. John T. Knight, quartermaster, U. S. Army, chief quartermaster Department of Santiago, the steamship *San Juan*, which vessel is accepted with the full knowledge and understanding that the Secretary of War does not consider that any allowance is due the owners on account of the use of the vessel, she being captured property, or for any damages sustained while the vessel has been in possession of the United States Government, the return of the vessel being a generous act on the part of the United States Government, and that any claim subsequently made for such use and damages shall be a matter for future consideration of the War Department.

"And we name and authorize our agents in Santiago de Cuba—

Messrs. Gallego, Mesa & Co., of said city—to receive and take possession of said steamship *San Juan*.

"SOBRINOS DE HERRERA.
"JOSÉ BLANCO HERRERA.
"SOBRINOS DE HERRERA.
"COSME BLANCO HERRERA."

"To all to whom these presents shall come or may concern, Greeting:

"Know ye that we, Cosme Blanco Herrera and José Blanco Herrera, composing the firm of Sobrinos de Herrera (Herrera's Nephews), owners of the steamship *San Juan*, for and in consideration of the prompt return of the said steamship to our said firm in Habana, or to our legal representatives at Santiago de Cuba (the said vessel having been taken into the possession of the United States, by the officers, agents, or servants thereof, in the port of Santiago de Cuba, upon the surrender of the port by the Spanish military authorities to the military authorities of the United States, and having since been in the possession and use of the United States Government), release and forever discharge, and do by these presents, for themselves, their heirs, administrators, and assigns, release and forever discharge the said Government of the United States, and its officers, agents, or servants, of and from all manner of actions, damages, claims, and demands whatsoever which, against the said United States Government, or any of its officers or agents, the said Sobrinos de Herrera ever had, now have, or may have by reason of the seizure or taking possession of the said steamship *San Juan* as aforesaid by the United States Government, its officers, agents, or servants, or by reason of the subsequent retention of possession of the said
12 vessel, or by its use by the Government of the United States, its servants, officers, or agents.

"And the said Sobrinos de Herrera further covenant that they are the parties lawfully interested in the premises, and have good right to receive the said steamship and to give this release.

"Done at the city of Habana, Cuba, this 17th day of May, 1899.

"[SEAL.] SOBRINOS DE HERRERA.
"[SEAL.] JOSÉ BLANCO HERRERA.
"[SEAL.] COSME BLANCO HERRERA.
"[SEAL.] SOBRINOS DE HERRERA.

"Witness:
"I. N. SAVITTA."

VI.

From about November 9, 1898, when the claimants were notified by the Quartermaster-General of the United States Army that the United States proposed to return to them said vessel, until May 17, 1899, a period of 190 days, said vessel, though retained by the United States as set forth in finding V, was not used by them. During said period of detention the United States kept on board said vessel a watchman, who was paid by them $45 per month.

If the claimants are entitled to compensation for the use of said vessel during said period, the reasonable value thereof, taking into consideration that the vessel was not used during said period, would be $125 per day for 190 days, or $23,750.

VII.

It appears that upon the return of said vessel to claimants by the United States authorities tools and implements of the value of $232.50 were missing from said vessel, but it is not shown by whom said tools and implements were taken.

It is not shown what crockery ware, linen, cutlery, and other table articles, and other furniture were on board said vessel when taken possession of by the United States authorities.

At the time said steamer was turned over to claimants it appears to have been in as good condition, ordinary wear and tear excepted, as when taken possession of by said authorities.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law, on the authority of the case of *Hijo v. United States* (194 U. S., 315), that the claim herein is one arising from the capture and use of a vessel as an act of war, and the court is therefore without jurisdiction, and the petition is dismissed.

Opinion.

PEELLE, *Ch. J.*, delivered the opinion of the court:

This action is founded on a claim for the use and damage for the detention of the steamship *San Juan*, owned by Spanish subjects, captured in the port of Santiago, Cuba, during the war with Spain, July, 1898. The seizure was by the Army, and no question of prize is involved.

13 But for the averment in the petition that the vessel herein was taken possession of by the United States "as private property and without any claim of title by reason of capture, or confiscation, or forfeiture," and used for lawful governmental purposes, the question of the liability of the United States might perhaps have been determined under rule 37 and 92 before either party had incurred expense in the taking of testimony.

This case is ruled by that of *Hijo v. The United States* (194 U. S. R., 315, 320), unless excepted therefrom by reason of the relation of the United States to Cuba. That case, like the one here, was for the capture, use, and damage for detention of a vessel, owned by Spanish subjects, in the port of Ponce, P. R., at the time of the capture and surrender of that port and city in July, 1898, to the naval and military forces of the United States.

There, as here, the vessel was used or detained by the military forces under the orders of the Quartermaster's Department of the Army until April, 1899, when the vessel, as here, was returned to the

owners on condition that all claims for use or damage for detention should be waived, which was done.

In each case the vessel captured was owned by Spanish subjects, and the capture, use and detention of the vessel occurred during the war with Spain, which war, says the court in the case cited, "did not in law cease until the ratification in April, 1899, of the treaty of peace."

In the case the contention was that the claim arose out of an implied contract, and that an action could be maintained thereon under section 1 of the act of March 3, 1887, commonly known as the Tucker Act. (24 Stat. L., 505.) But in response to that contention the court, by Mr. Justice Harlan, said:

"The present suit finds no sanction in the above act, even if the plaintiff were not a foreign corporation. Its claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an Executive Department. Nor can it be said to be founded on contract, express or implied. There is no element of contract in the case, for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and not for any purposes of gain. * * * The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but, as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. 'A truce or suspension of armies,' says Kent, 'does not terminate the war, but it is one of the *commercia belli* which suspends its operations. * * * At the expiration of the truce hostilities
14 may recommence without any fresh declaration of war.' (1 Kent, 159, 161.) If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel pending negotiations for a treaty of peace. Besides, the treaty of peace between the two countries provided that 'the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle all claims of its citizens against Spain relinquished in this article.' This stipulation clearly embraces the

claim of the plaintiff—its claim against the United States for indemnity having arisen prior to the exchange of ratifications of the treaty of peace with Spain.

"We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail, for it is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the courts. (*The Cherokee Tobacco*, 11 Wall., 616, 621; *Whitney v. Robertson*, 124 U. S., 190, 194; *United States v. Lee Yen Tai*, 185 U. S., 213, 221.)"

We have thus quoted from that case at length because the ruling and language in that case cover the present case completely, unless excepted therefrom by reason of the peculiar relation of the United States to Cuba, and as to that let us now inquire.

It must be borne in mind that at the time of the capture and use of the vessel in question Cuba was under the dominion and sovereignty of Spain, and so remained until relinquished by the terms of the treaty of Paris, when, on December 13, 1898, the United States, pursuant to the terms of that treaty, entered into the occupacy of said island and established therein a military government and maintained the same under the direction of the President as Commander in Chief of the Army and Navy of the United States until May, 1902, when the government and control of the island were transferred to the President and Congress of the Republic of Cuba.

Even if it should be conceded that the surrender of the port and city of Santiago to the military and naval forces of the United States in July, 1898, carried with it the sovereignty of the United States over that particular district, still by the protocol of August 12, 1898, the United States in effect conceded the sovereignty of Spain over the island. The protocol—a basis for the establishment of peace—which in terms suspended hostilities between the two countries, did not operate either to suspend or terminate the sovereignty of Spain over Cuba. By article V thereof provision was made for the appointment of commissioners to meet at Paris not later than October 1, 1898, to treat of peace; and it was not until by article I of the Treaty of Paris of December 10, 1898, that Spain relinquished "all claim of sovereignty over and title to Cuba." Hence the United States thereby recognized the sovereignty and authority of Spain over Cuba until terminated by the treaty; and though for some purposes the military authorities of the United States had prior thereto exercised dominion over particular parts of the territory acquired by conquest, the island nevertheless was foreign territory, held in trust by the United States for the inhabitants thereof. The conquest was not with the intention of holding or taking title to the island or any part thereof, as had previously been declared by the joint resolution of Congress.

In other words, "during the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operations, or express provisions, extinguishes his title forever"

(Sec. 545 Wheaton's International Law and authorities there cited). Here, while by the treaty the sovereignty of Spain was relinquished, it was not transferred to the United States, so that the authority of the United States over the island or any district thereof was, as expressed in said joint resolution, only "for the pacification thereof."

In the case of *Neely v. Henkel* (180 U. S., 109, 120) the court, after reviewing the objects intended to be accomplished by the war with Spain and the military occupation thereof as disclosed by public acts and official documents, said:

"Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

"It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territorially held in trust for the inhabitants of Cuba, to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

But the contention of the claimants is that their action is based on the Executive order of the President of July 13, 1898, which was promulgated by the Secretary of War in General Order No. 101, July 18, 1898, providing, among other things, as follows:

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained. * * *

"Private property taken for the use of the Army is to be paid for, when possible, in cash at a fair valuation; and when payment in cash is not possible receipts are to be given."

The contention is that the order of the President so promulgated is a regulation of the War Department, and that, therefore, they are entitled to maintain their action thereon under section 1, act of 1887. But this question, we think, is fully met by the ruling in the case of *Hijo v. The United States, supra*—that is to say, "the
16 seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the

vessel after actual hostilities were suspended by the protocol of August 12, 1898." And this, we think, applies with equal force to Cuba as to Porto Rico, as the vessel captured was owned by Spanish subjects, natives of Spain, residing in Cuba. Native Spaniards who were Spanish subjects residing in Cuba during said war were enemies, and their property was entitled to no more protection from the United States than other Spanish subjects, and particularly when, as in the present case, the vessel prior to its capture had been used in transporting Spanish troops, munitions of war, and supplies for the Spanish troops from place to place.

While the military and naval forces of the United States were enjoined by the Executive order to respect "private property, whether belonging to individuals or corporations," it also authorized the confiscation of such property for cause. Besides, the same order authorized the seizure, by the military occupant, of the means of transportation, including "telegraph lines and cables, railways and boats," although such property belonged to private individuals or corporations. True, when so seized the order directed the return of such property "unless destroyed under military necessity."

The Government, in the present case, elected to return the vessel instead of destroying it, but the return thereof is an argument in favor of the generosity of the Government and not a confession that the seizure was not an act of war.

But it is contended that the joint resolution of Congress respecting the independence of the people of Cuba and the relinquishment of Spanish authority in the island, coupled with the disclaimer on the part of the United States to exercise sovereignty, jurisdiction, or control over said island—other than for the pacification thereof—operated to constitute the people of Cuba an ally to force Spain to relinquish her authority and control in said island, thereby segregating from Spanish territory as enemy's country said island.

And from official documents as well as from the history of the time, of which the court takes judicial notice, the insurrectionists in said island against the Government of Spain did coöperate with the military forces of the United States in liberating Cuba from Spanish control. But the island was nevertheless under the sovereignty and control of Spain during the capture and use of the vessel in question, which capture and use were held by the executive department of the Government as a military necessity arising in the belligerent prosecution of the war, and for that reason the Department denied to the claimants herein any compensation therefor.

What the United States did to establish and maintain the freedom and independence of Cuba was voluntarily undertaken and done; and in the execution of the purpose of the joint resolutions it was the judgment of the President, charged therewith, that the capture of the vessel and its use for the military and humane purposes set forth in the findings were for purposes of war and not for again. In this view of the case individual rights must give way to the
17 rights of the people of Cuba, for whose independence the United States intervened and for whose benefit the island was later held in trust.

But if we should assume that because of the acts of the United States the island was not enemy's country and the claimants, by reason of their residence in Cuba, were not enemies, still the court would be confronted with Article VII of the treaty of Paris, which provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war."

The claimants herein were not only Spanish subjects, but were natives of Spain, so that whatever claim may have accrued to them against the United States during said war was relinquished in the treaty by the act of Spain.

Nor do we deem it material in the present case to consider the difference between native Cubans as subjects of Spain and natives of Spain who were subjects thereof residing in Cuba, for it is clear that whatever claim the subjects of Spain had against the United States from the date of the insurrection in Cuba to the date of the exchange of ratifications of the treaty were relinquished; and while the United States by Article VII of the treaty agreed to "adjudicate and settle the claims of its citizens against Spain," thereby protecting Spain against the claims of any citizen of the United States, Spain did not obligate itself by the treaty to pay the claims of her subjects against the United States which she had relinquished; but we do not see that this is material or that it in any way strengthens the claimants' right to recover for the use or damages for the detention of their vessel. By the act of Spain the United States were released from the payment of such claims, and they can not now be asserted against the United States.

True, within the time prescribed by Article IX of the treaty the claimants renounced their allegiance to Spain, and thereby adopted the nationality of Cuba; but that was long after the capture, use, and detention of the vessel and after the return thereof to the claimants, as set forth in the findings.

We deem it unnecessary to enter upon a discussion of the circumstances under which the vessel was restored to the claimants further than to say that no right to recover for the use and detention of the vessel can be predicated on the action of the War Department in requiring the claimants to accept the return of their vessel under the circumstances of this case, for even if the claimants had been permitted to receive the vessel under protest reserving in the receipt in express terms their right to prosecute a claim for the use and detention of the vessel, it would have availed them nothing, as there was no element of contract either in the capture, use, or detention of the vessel, nor was anything said by the officers of the Government from which there could be implied an agreement or obligation to pay therefor, and the claim being one sounding in tort no action will lie thereon against the United States on the order of the President.

For these reasons the numerous cases cited by the claimants, to

the effect that where the Government appropriates private
18 property which it does not claim as its own it does so under an implied contract to pay therefor, have no application in this case. Nor has the case of the *Philippine Sugar Estates Development Company* (40 C. Cls. R., 33), for the reason that at the time of the taking of the property in that case war with Spain had ceased; the Philippine Islands had been ceded to and were under the control and dominion of the United States; the country had been reduced to subjection before the taking of the property, and hence it was held that an implied contract arose to pay for the property so taken. But that is not the case here, as the capture and use of the vessel were both during the war with Spain, and even before the occupation of Cuba by the military forces of the United States.

Although we have reached the conclusion that the case of *Hijo v. The United States, supra*, is controlling in the present case, notwithstanding the peculiar relation of the United States to Cuba, we have found the facts on the merits of the case for the reason that in the case just cited the court, in concluding its opinion, said: "We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail, for it is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the courts." So that if, in case of appeal, the Supreme Court should differ with this court and hold that an action could be maintained under the act of March, 1887, they would then have before them the question whether the treaty, as in that case, operated to relinquish the claim herein.

For the reasons we have given we must hold that the court is without jurisdiction; and we may add that if we should take jurisdiction we should feel constrained under the wording of the treaty to apply it in this case, so that in either event the claimants must fail; and for that reason their petition is dismissed.

BY THE COURT.

Howry, J., was not present when this case was heard on the claimants' motion for new trial and took no part in the decision.

19 *V. Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 4th day of May, 1908, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants, and do order, adjudge and decree, that the petition of the claimants, Cosme Blanco Herrera and José Blanco Herrera, doing business under the firm name of Herrera Nephews, be and the same is hereby, dismissed.

BY THE COURT.

20 VII. *Argument and Submission of Claimants' Motion for New Trial and Order Thereon.*

On the 26th day of April, 1909, the claimants' motion for a new trial, filed December 5, 1908, was argued by Mr. Howard T. Kingsbury and by Mr. Crammond Kennedy, attorneys for the claimants, and by Mr. Franklin W. Collins, for the defendants and submitted.

On the 20th day of May, 1909, the Court filed the following order: Overruled,

By the Court,

STANTON J. PEELLE,
Chief Justice.

21 VII. *Application for and Allowance of Appeal.*

Motion for Allowance of Appeal to the Supreme Court.

Come now the claimants, by their attorneys, and move this Honorable Court for the allowance of an appeal to the Supreme Court of the United States from the judgment of this Court entered on the 20th day of May, 1909, in this cause.

COUDERT BROTHERS AND
CRAMMOND KENNEDY,
Attorneys for Claimants.

FRANK D. PAVEY,
Of Counsel.

Filed July 3, 1909.
Allowed July 8, 1909, by Chief Justice Peelle, in vacation.

22 In the Court of Claims.

No. 25425.

COSME BLANCO HERRERA and JOSE BLANCO HERRERA, Doing Business as a Firm of Herrera Nephews,
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of the Court; of the judgment of the Court; of the argument and submission of the claimants' motion for new trial, and of the order thereon; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 9 day of July, 1909.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 21,752. Court of Claims. Term No. 270. Cosme Blanco Herrera and Jose Blanco Herrera, doing business under the firm name of Herrera Nephews, appellants, vs. The United States. Filed July 12th, 1909. File No. 21,752.

HERRERA *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 89. Argued December 11, 12, 1911.—Decided January 15, 1912.

War makes the citizens or subjects of one belligerent enemies of the government, citizens and subjects of the other.

During the war with Spain Cuba was enemy's country; and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, and their property enemy's property and subject to seizure, confiscation and destruction.

Property in the harbor after the capitulation of Santiago remained enemy property, and seizures thereof by the United States were acts of war.

Nothing in the President's proclamation of July 13, 1898, militated against the right of the United States to confiscate enemy's property for the use of the army of occupation.

There is a distinction between the capture of an enemy's port in a war with a foreign country, and the restoration of national authority over territory in a civil war and in the protection of property after capture. *The Venice*, 2 Wall. 258, distinguished.

There is a distinction between a seizure of private property of an enemy for immediate use of the army and the taking of such property as booty of war. *Planters Bank* v. *Union Bank*, 16 Wall. 483.

Under the prohibitions of the Tucker Act, the Court of Claims has no jurisdiction for claims for seizures made in Santiago after its capitulation in violation of the President's proclamation of July 13, 1898, or of the laws of war.

Right of Spanish subjects against the United States for indemnity for illegal seizures and detention of property during the war of 1898 was taken away by the treaty of peace. *Hijo* v. *United States*, 194 U. S. 315.

43 Ct. Cl. 430, affirmed.

THE facts, which involve the jurisdiction of the Court of Claims and the liability of the United States for use of enemy vessels seized during the war with Spain, are stated in the opinion.

Mr. Howard Thayer Kingsbury and *Mr. Crammond Kennedy*, with whom *Mr. Frank D. Pavey* was on the brief, for appellants:

The President's instructions of July 13, 1898, govern the case at bar; and, while they were framed to meet the situation created by the capitulation of Santiago, they are in accordance with the laws of war defining the reciprocal rights and obligations of the occupying power and the inhabitants of the occupied territory—see decision of Sir William Scott (Lord Stowell) in the prize cases at capitulation of Genoa, 4 Robinson, Adm. Reps. 388. If the shipping was seized before the capitulation and not released by any of the articles, it could be held by the captor for condemnation or ransom, but if the seizure was made after that time, it would be considered, not as the exercise of any rights of war but as mere lawless rapine and plunder. See also 3 Phillimore's Int. Law, 3d ed. 192.

As to legal effect of military occupation on the inhabitants and their property in the occupied territory, see *The Venice*, 2 Wall. 258, a vessel seized after capture of New Orleans, in which it was held that the vessel though undoubtedly enemy's property at the time she was anchored in Lake Pontchartrain, could not be regarded as remaining such after the sixth of May.

This opinion was unanimous, and it has been cited by this court with approval in the following cases: *The Baigorry*, 2 Wall. 481; *The Reform*, 3 Wall. 617; *The Peterhoff*, 5 Wall. 60; *Ouachita Cotton*, 6 Wall. 531; *The Grapeshot*, 9 Wall. 131; *United States* v. *Padelford*, 9 Wall. 541; *Levy* v. *Stewart*, 11 Wall. 253; *Mail Co.* v. *Flanders*, 12 Wall. 134; *Hamilton* v. *Dillin*, 21 Wall. 94; *Desmare* v. *United States*, 93 U. S. 611; *Burbank* v. *Conrad*, 96 U. S. 301; *Clark* v. *United States*, 99 U. S. 496.

In *Cross* v. *Harrison*, 16 How. 164, it was held that the formation of the civil government in California,

when it was effected, was the lawful exercise of belligerent right over a conquered territory, and that this power is given by the law of nations for the purpose of protecting the inhabitants of the occupied territory and their persons and property. And it is for this reason that, both under the common law and the law of nations, conquered states or districts retain their old laws until the conqueror or military occupant thinks fit to alter them. See *Planters Bank* v. *Union Bank*, 18 Wall. 483.

All of the most recent authors concur in this view. See especially Les Requisitions Militaires du Temps de Guerre by Ch. Pont, 85, 86; Latifi's "Effect of War on Property," London, 1909, 30; Bernier, "De l'Occupation Militaire," 108; Kent's Comm. 14th ed. 92.

The rules and regulations prescribed by the President in his instructions of July 13, 1898, to the Secretary of War, were in accordance with the laws governing the firm and permanent occupation of enemy territory, apart from the fact of capitulation (as distinguished from capture by assault), or from the fact that the capitulated territory was held by the United States "in trust for the people of Cuba." *Neely* v. *Henkle*, 180 U. S. 109, 120. These rules were substantially the same as those formulated by the Brussels Conference in 1874 for the military occupation of enemy territory and incorporated in 1899 into the "Convention as to the Laws and Customs of War on Land," adopted at The Hague, to which the United States and all the leading powers of the world have become parties.

These rules are substantially the same as Lieber's Code (General Order, No. 100), any differences being due to the fact that the latter were prepared for the conduct of the Army of the United States in a civil war in which the enemy was regarded as traitors and rebels and not (as in an international war) where each side is respected as doing its duty to its own country. General Orders No. 101

were issued specifically to govern the situation resulting from the capitulation of Santiago. As to effect of such orders see *United States* v. *Eliason*, 16 Pet. 291, 302.

As to sanctity of private property during war, as recognized by the United States, see treaty with Prussia of 1788, Art. XXIII, and treaty of 1848 with Mexico, in which both countries "solemnly pledged themselves to each other and the world" to observe the same rules "upon the entrance of the armies of either nation into the territories of the other."

Two centuries earlier the sanctity of private property was stated in the strongest terms by Grotius (De Jure Belli et Pacis, Lib. III, Ch. XX, § VII, par. 1).

In the code of Moses, barbarous as it was, a very much more humane treatment was prescribed for enemies who surrendered. (Deut. XX: 10–14.)

The claimants were not Spanish subjects in the sense of the treaty, and their claims were not released by Spain to the United States. *Hijo* v. *United States*, 194 U. S. 315, does not apply to this case.

There was no way provided in the treaty by which persons born in the island—the people of Cuba—like the claimants in No. 90, could preserve Spanish nationality and allegiance which they threw off when they declared their independence in 1895 and of which they were relieved (so far as the United States was concerned) by the declaration of their independence in and by the Joint Resolution of Congress of April 20, 1898. The claimants in No. 89 could have retained their Spanish nationality and allegiance under Art. IX, but they refused to do so because they had cast in their lot with the people of Cuba, thus becoming under the constitution of Cuba citizens of that republic by naturalization.

When an act is done at one time and it operates upon the thing as if done at another time, it is said to do so by relation. 2 Bouvier's Dic., Rawle's Revision, 864; 24

Am. & Eng. Ency. Law, 2d ed. 275. The doctrine of relation as to the commencement of the existence and responsibility of states, also as to their title to their territory, and the citizenship of their people, applies to Cuba.

As the revolution succeeded, and the republic became recognized, its acts from the commencement of its existence are upheld as those of an independent nation. *Williams* v. *Bruffy*, 96 U. S. 176. See also *Harcourt* v. *Gaillard*, 12 Wheat. 524, 527; *M'Ilvaine* v. *Coxe's Lessee*, 4 Cranch, 209, 212; *Underhill* v. *Hernandez*, 168 U. S. 250, 253, citing *United States* v. *Rice*, 4 Wheat. 246; *Fleming* v. *Page*, 9 How. 603; *Thorington* v. *Smith*, 8 Wall. 1; *Ford* v. *Surget*, 97 U. S. 594; *Dow* v. *Johnson*, 100 U. S. 158; *United States* v. *Trumball*, 48 Fed. Rep. 94. See also *Inglis* v. *Sailors Snug Harbor*, 3 Pet. 99.

Children born in Santiago after the capitulation, while the United States was holding the capitulated territory "in trust for the people of Cuba" were not Spaniards by birth.

For application of the doctrine of relation in international arbitrations, see *Heny's Case* in Ralston's Rep. 17; The *Dix Case*, Ralston's Rep. 8; the *Puerto Cabello Railway Company Case*, Ralston's Rep. 458; the *Bovallins* and *Hedlund Cases*, Ralston's Rep. 952. For other cases see 4 Moore's Int. Arb'ns, No. 4330.

The releases in both cases were obtained under duress. *Swift Co.* v. *United States*, 111 U. S. 28; *Maxwell* v. *Griswold*, 10 How. 242, 256; *Adams* v. *United States*, 20 Ct. Cl. 115; *Bostwick* v. *United States*, 94 U. S. 53; *Rush* v. *United States*, 35 Ct. Cl. 239; *Robertson* v. *Frank Bros. Co.*, 132 U. S. 17.

Mr. Assistant Attorney General Thompson, with whom *Mr. Franklin W. Collins* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition in the Court of Claims for the recovery of $88,200 for the value of the use and profits of which claimants were deprived, as it is alleged, by the taking and detention of a certain steamship by the United States during the war with Spain, and for the loss of certain property belonging to and a part of such steamship alleged to be "fairly worth" the sum of $5,000, amounting in all to the sum of $93,200.

Claimants base their right to recover upon an implied contract arising from the facts which we shall presently detail. Opposing this view, the Government contends that the property was enemy property seized for military uses and that, besides, the record does not show a "convention between the parties" or circumstances from which a contract could be implied, and that therefore the case is one sounding in tort and claimants have no right of recovery.

The court found as a conclusion of law from the facts, "on the authority of the case of *Hijo* v. *United States*, 194 U. S. 315, that the claim herein is one arising from the capture and use of a vessel as an act of war, and the court is therefore without jurisdiction, and the petition is dismissed."

The claimants, at the time the steamship was taken, composed a commercial partnership, doing business under the firm name of Herrera Nephews. They were born in Spain, and, under the Spanish régime in Cuba, were Spanish subjects residing in Havana. After the treaty they did not, in accordance with its terms, preserve their allegiance to Spain.

On the sixteenth day of July, 1898, the Spanish forces then occupying the territory constituting the division of Santiago, including the city and port of that name, capitu-

lated to the United States in accordance with the terms of a military convention which provided that all hostilities between the American and the Spanish forces in that district should cease and that the Spanish forces should be returned, at the expense of the United States, to Spain. Actual hostilities ceased with the surrender of Santiago.

The United States military authorities seized and captured the steamer *San Juan* on the seventeenth of July, 1898, she having been held in the harbor by its blockade by the United States naval authorities. Prior to that date she had been used to transport Spanish troops, munitions of war and supplies for the Spanish troops from place to place. After her capture she was used for like service for American troops and indigent Cubans until November, 1898, a period of 115 days. The reasonable value of her use was $150 per day, amounting to the sum of $17,250, no part of which has been paid to claimants.

After the surrender of Santiago and the seizure of the steamship, the Secretary of War, on July 18, 1898, in pursuance of the proclamation of the President of July 13, 1898, issued General Order No. 101, which, among other things, provided that "Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity, are not to be retained. . . .

"Private property taken for the use of the Army is to be paid for, when possible, in cash, at a fair valuation, and when payment in cash is not possible receipts are to be given."

This order was promulgated in Cuba, July 20, 1898.

On November 8, 1898, the Quartermaster-General of the Army telegraphed to R. A. C. Smith, the representa-

tive and attorney-in-fact of claimants, that it was proposed to return the "captured steamer" to owners, and asked him to wire their names. Smith answered on the twelfth "that claimants agreed to accept the vessel, reserving their right to make claim." On the fifteenth the War Department notified Smith that the Government was ready to deliver the vessel to her owners upon condition that a receipt be given showing that she was accepted with full knowledge and understanding that the Secretary of War did not consider that any allowance was due the owners on account of her use, she being captured property, or for any damage sustained by her while she was in the possession of the United States, and that any claim subsequently made should be a matter for future consideration by the War Department. The terms were rejected and she remained in the possession of the United States.

On April 25, 1899, the Quartermaster at Santiago, on instructions from the War Department, wrote claimants' agent that if they did not receive the steamer "in accordance with the conditions hereinafter expressed," she would be delivered to the Department of the Quartermaster of the Army and retained as property of the United States.

On the seventeenth claimants accepted her and gave the following receipt:

"Received this 17th day of May, 1899, at Santiago, Cuba, from Maj. John T. Knight, quartermaster, U. S. Army, chief quartermaster Department of Santiago, the steamship *San Juan*, which vessel is accepted with the full knowledge and understanding that the Secretary of War does not consider that any allowance is due the owners on account of the use of the vessel, she being captured property, or for any damages sustained while the vessel has been in possession of the United States Government, the return of the vessel being a generous act on the part of the United States Government, and that any claim subse-

quently made for such use and damages shall be a matter for future consideration of the War Department.

"And we name and authorize our agents in Santiago de Cuba—Messrs. Gallego, Mesa & Co., of said city—to receive and take possession of said steamship *San Juan.*"

They also executed a paper which recited that it was given in consideration of the prompt return of the vessel to claimants, and that released the Government and its officers and agents "from all manner of actions, damages, claims and demands whatsoever" on account of her seizure, detention and use.

From the time that the Quartermaster-General of the Army proposed to return the vessel until May 17, 1899, a period of 190 days, the vessel, though retained by the United States, was not used. During said period the United States kept a watchman on board, who was paid $45 per month. The compensation claimants are entitled to, if any, for such period, taking into account that the vessel was not used, would be $125 per day, or $23,750.

Upon the return of the vessel to claimants, tools and implements of the value of $232.50 were missing, but it is not shown by whom they were taken. No other property is shown to have been taken possession of by the United States. The steamer, when returned, appeared to have been in as good condition as when taken into possession, ordinary wear and tear excepted.

As we have seen, the Court of Claims rested its decision on the case of *Hijo* v. *United States*, 194 U. S. 315, and that case also is the main reliance of the Government's argument. Claimants, however, contend that the *Hijo Case* is distinguishable from that at bar.

The action there was brought to recover the value of the use of a vessel belonging to Spanish subjects and taken by the United States in the port of Ponce, Porto Rico, when that city was captured by the United States army and

navy on July 28, 1898. The vessel was used by the quartermaster until some time in April, 1899, when she was ordered to be returned to the owner, if all claims for damages for use or detention should be waived. The condition was refused, and the vessel was subsequently abandoned and was wrecked in a hurricane. We quote the following from the statement of facts in the opinion: "The vessel was never in naval custody nor condemned as prize. When seized it was a Spanish vessel, carried a Spanish flag, and its owner, captain and crew were all Spanish subjects. It did not come within any of the declared exemptions from seizure set forth in the proclamation of the President of April 26, 1898. 30 Stat. 1770. A claim filed in the War Department in February, 1900, for its use, was rejected."

The Court of Claims dismissed the petition on the ground that the vessel was properly seized as enemy property and its use was by the war power for war purposes. This court sustained the judgment and the principles upon which it was based.

A question of jurisdiction became prominent in the case. The action was brought in the District Court of Porto Rico, and the court could only have had jurisdiction under the Tucker Act, so called, which provides for the bringing of suits against the United States. March 3, 1887, 24 Stat. 505, c. 359. In other words, as expressed in the act, omitting grounds of action with which the case was not concerned, that court was given jurisdiction of suits "upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort." Considering whether the action was of that nature, this court said that there was no element of contract in the case, for nothing was done or said by the officers of the United States from which could be implied an agreement or obligation to pay for the use of the vessel; and declared, further, that according to

established principles of law, its owners, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations, and that therefore the vessel was to be deemed enemy's property. "It was seized," it was said, "as property of that kind, for purposes of war, and not for any purposes of gain." In further emphasis of this conclusion, it was added: "The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained . . . against the United States."

It was also decided that the claim of the plaintiff in the action was embraced in the stipulation in the treaty of peace between Spain and the United States, by which they "mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. . . ." That effect, it was declared, must be given to the treaty, even though the Tucker Act could have been construed to authorize the suit, upon the ground that each being equally the supreme law of the land, the last in date must prevail in the courts.

Before comparing that case with the case at bar we may take a glance at *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 306, where it was decided that, Cuba being "enemy's country," even "an American corporation doing business in Cuba was during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to

be seized and confiscated by the United States in the progress of the war then being prosecuted."

The action in that case was in the Court of Claims to recover from the United States the alleged value of certain property destroyed in Cuba during the war with Spain, by order of the officer commanding the United States troops operating in the locality of the property, the purpose of the order being "to destroy all places of occupation or habitation which might contain fever germs." The buildings destroyed were 66 in number and were used in connection with mining operations and the manufacture of iron and steel products.

The destruction of the buildings was considered as an act of war and sustained as such. It was also decided, that, even on the supposition that such destruction was wrongful and unnecessary a tort was committed, and though committed in the interest of the United States, there was no element of contract and the action was not one of which the Court of Claims could "take cognizance, whatever other redress was open to the plaintiff."

We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemy's property and subject to seizure, confiscation and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies of the government and of the citizens or subjects of the other. *The Venice*, 2 Wall. 258, 274; *White* v. *Burnley*, 20 How. 235, 249.

These consequences, it is insisted, are averted in the case at bar by two important circumstances: that Santiago, unlike Porto Rico, was not captured but capitulated,

and by the explicit direction of the proclamation of the President of July 13, 1898, promulgated in Cuba on the twentieth. The argument is that those circumstances modified the general rule, and that the property of claimant ceased to be "hostile" and passed "under the sovereignty" of the United States, and as inviolable as other property under the jurisdiction of the United States, and, if taken for public use, an obligation to make compensation would be implied. *The Venice*, 2 Wall. 258, and other cases are adduced to support the contention. It was decided in *The Venice* that after the surrender of New Orleans its military occupation by the Federal forces "drew after it the full measure of protection to persons and property consistent with a necessary subjection to military government." The limitation is important. The case is not as broad as the contention which it is cited to support. It was concerned with the restoration of the authority of the United States over a part of the United States which had been in a state of insurrection, and in such case, that is, in districts occupied by national troops, it was "the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject in most respects to treatment as enemies." Such occupation, it was said, did not "restore peace, or, in all respects, former relations;" but it replaced "rebel by national authority," and recognized, "to some extent, the conditions and the responsibility of national citizenship." In emphasis of the same view, it was said: "As far as possible the people of such parts of the insurgent States as came under national occupation and control were treated as if their relations to the National Government had never been interrupted."

The Ouachita Cotton, 6 Wall. 521, does not change the ruling in *The Venice* from an expression of the special policy of the Government indicated by its legislation to a declaration of law necessarily following from the military occupation of even enemy country. It was an obvious

application of the principles of *The Venice* to hold that, with the restoration of the national authority, "from that time its citizens were clothed with the same rights of property, and were subject to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection, as the inhabitants of the loyal States," and that "such is the result of the application of well settled principles of public law." To the same effect is *Desmare* v. *United States*, 93 U. S. 605, 611. Nor was there any intention to enlarge the ruling in *The Venice* in *United States* v. *Padelford*, 9 Wall. 531.

The case of *The Grapeshot*, 9 Wall. 129, 132, is also cited by claimants, and some of its language demands notice. The question involved was the legality of a provisional court for the State of Louisiana established by the President after New Orleans and parts of the State had been occupied by the national troops. Expressing the purpose of the National Government the court said that it was "neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the reëstablishment of legitimate authority." It was further said that it was the duty of the Government, "wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice." To this was added the following: "The duty of the National Government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held.

But it was not intended to express a limitation upon

the undoubted belligerent right to use and confiscate all property of an enemy and to dispose of it at will. *Miller* v. *United States*, 11 Wall. 268, 305. *The Venice*, and cases like it, expressed and enforced limitations to a certain extent upon such right growing out of the policy of the Government. It may be, as said by Kent (1 Kent, 92), that "The general usage now is, not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for capitulation." It may also be, as further said by the learned commentator, that "if the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private property of pacific persons for the sake of gain, . . . he violates the modern usages of war." Id. 92 and 93.

If the record presented such a case the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power cannot be enlarged by its emotions. Besides, we must regard the seizure of the *San Juan* as an exertion of the war power, and by this we do not mean as mere "booty of war," and the comments made in *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 495, in regard to an attempt by the commander at New Orleans, fifteen months after the occupation of the city by the National Government, to confiscate the indebtedness of one of the banks to the other, do not apply. We only mean that the seizure was for the immediate use of the army, a right recognized in that case, for we do not accept the view contended for by claimants that with the surrender of Santiago and the cessation of active operations in the Santiago district enemy property lost such character and was not subject to such right of capture. The war

was flagrant elsewhere, and in such case *Planters' Bank* v. *Union Bank* is authority for the right, not against it. It was there decided that the military commander at New Orleans "had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the Government, or the effect of congressional action." Such pledge and effect existed, it was held, citing the case of *The Venice*. It may be said the indebtedness was not absolutely exempt from confiscation as enemy's property, but only that it was not, under the particular circumstances, "subject to military seizure as booty of war." And "booty of war" was distinguished from "a seizure for immediate use of the army." This is a distinction important to observe, and is recognized explicitly or implicitly in all of the cases and references contained in the able argument of counsel. It accommodates, when its full range is properly understood, the necessities of the conqueror and the personal and property rights, if they may be called such, of the conquered. And there is nothing in the President's proclamation of July 13, 1898, which militates against it. But suppose we should grant the contrary. Suppose we should grant to the *San Juan* the broadest immunity from seizure or detention. We are then brought to consider the quality of the act of the officers of the army who seized and used her. It would seem easy to describe. If it was done in violation of the President's proclamation; if it was done in violation of the laws of war and the conditions arising from the capitulation of Santiago, it was done in wrong, and claimants encounter the prohibitions of the Tucker Act against the jurisdiction of the Court of Claims. They are in the situation of the claimant in *Hijo* v. *United States* and *Juragua Iron Co.* v. *United States*. A tort was committed against them, and though committed in the interest of the United States, there is no element of contract and the action is one of which the Court of Claims could not take jurisdiction, whatever

other redress is open to claimants. Indeed, we might have rested this branch of the case on those cases, both for the requirements of the Tucker Act and the rights and powers of belligerents, conqueror or conquered. We have restated the propositions declared only in deference to the earnestness and force of the argument of claimants' counsel. And we rest the case on those propositions and do not enter into a consideration of the citizenship of claimants, whether born in Spain and Spanish subjects when their vessel was seized, or Cuban by relation to the time either of the declaration of Cuban independence or of its recognition by Congress, as contended. If Spanish subjects, under the authority of *Hijo* v. *United States*, their right of indemnity for the seizure and use of their vessel was taken away by the treaty between Spain and the United States.

Judgment affirmed.